***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-1307

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 76-1307

v. :

BERNARD GOLDENBERG, :

Defendant-Appellant. :

----------X

On Appeal From The United States District Court
For The Southern District of New York

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BRIEF FOR APPELLANT

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Dated: October 7,1976

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# BRIEF FOR APPELLANT

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## Questions Presented

1. Whether the Trial Court erred in admitting statements made to the witness Al Dayon by John Gluskin concerning the Appellant's alleged participation in the sale of Mastercraft stock.

2. Whether the Trial Court erred in instructing the jury on flight as no evidence of flight was adduced at the Appellant's trial.

STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

This is an appeal by Bernard L. Goldenberg from a judgment of the United States District Court for the Southern District of New York ( The Honorable Lee P. Gagliardi) rendered on April 12, 1976, after a one week jury trial convicting the Appellant of income tax evasion during the calendar year 1968 in violation of Title 26 United States Code, Section 7201 and knowingly making and subscribing a false joint tax return containing declarations under the penalties of perjury in violation of Title 26 United States Code, Section 7206.

On June 14,1976, Appellant was sentenced by Judge Gagliardi to four months imprisonment. The Appellant is now free on a $50,000.00 personal recognizance bond pending the outcome of this appeal.

Morton Berger was counsel to the Appellant during the trial and has been retained by the Appellant for purposes of this appeal.

Statement Of Facts

The Appellant was indicted in a two count Indictment. Count I of said indictment charged him with income tax evasion during the calendar year 1968 in that he caused to be prepared, signed and filed a false and fraudulent joint United States Income Tax return

on behalf of himself and his wife wherein the reported taxable income was far less than that actually received in violation of Title 26 United States Code, Section 7201. Count II of the indictment charged the Appellant with knowingly making and subscribing a false joint tax return containing declarations under the penalties of perjury in violation of Title 26 United States Code Section 7206.

The trial commenced on April 6,1976. At the conclusion of the government's case in chief the Appellant moved for a judgment of acquittal. The motion was denied. The defense then presented its case and at its conclusion, renewed its motion for a judgment of acquittal. The motion was denied.

The government's case against the Appellant rested primarily upon the testimony of Al Dayon, a stockholder and employee of Mastercraft Corporation, certain bank transactions testified to by John Nagurney, legal assistant to the Chemical Bank, Irving A.King, Assistant Treasurer of the Central State Bank and Lois Weed, Assistant Cashier of the Chelsea National Bank and the testimony of Irving Lazurus, a check casher.

Further evidence was supplied through the testimony of Irving Shapiro, Gloria Wunk of the Internal Revenue Service and Philip Leeds, Secretary and counsel for Superior Plans, Inc.

The thrust of the Government's case was that the Appellant, Bernard Goldenberg made a deal with John Gluskin, attorney for

Mastercraft Corporation that for services rendered by the Appellant in connection with the sale of Mastercraft stock, the Appellant would receive approximately $540,000.00. Appellant then had a corporation, Superior Plans, Inc; set up as a method of funneling the funds that he was to get from the stock promotion to himself. Checks from Gluskin's special account were made payable to Superior Plans, Inc; and immediately upon deposit the Appellant as president of Superior Plans would issue corporate checks payable to himself or cash. He would then cash these corporate checks himself or would convert them into cash and official bank checks which he would cash with Irving Lazurus. In this manner he evaded reporting and paying income tax on approximately $500,000.00 worth of personal income.

## The Government's Case

Testimony of IRVING SHAPIRO

Irving Shapiro, field audit supervisor for the controllers office of the City of New York, testified as a government witness that he prepares tax returns and prepared the 1968 individual joint income tax return of the Appellant and the 1968 corporate return of Appellant's corporation Superior Plans, Inc; based upon slips of paper containing information furnished by the Appellant (51,53,54).* He testified that based upon this information supplied to him the Appellant's

* Page references refer to pages of the trial transcript.

taxable income for the calendar year 1968 was a minus $3,244.00 (55)

Testimony of GLORIA WUNK

Gloria Wunk, a Senior Clerk of the Internal Revenue Service testified that both Appellant's individual joint tax return and that of Superior Plans, Inc; for the calendar year 1968 were duly filed. (61-62)

Testimony of PHILIP LEEDS

Philip Leeds was the secretary and attorney for Superior Plans, Inc. He testified that he met the Appellant when Goldenberg was involved with a corporation known as First Standard (65). First Standard later merged with Mastercraft Corporation and the result was a new company retaining the name Mastercraft.(68) Conversations took place between himself, John Gluskin, attorney for Mastercraft, the Appellant and others regarding the raising of capital for the new company by selling stock owned by the employees. (69,70,71) Leeds was involved in selling the Mastercraft stock for a short while but decided not to continue. (93-94). The Appellant suggested that John Gluskin would take over the sales. (93).

Around this time the Appellant asked Leeds to set up a corporation for him. The corporation was incorporated March 7,1968, and was

called Superior Plans, Inc. (74,75). Appellant was its president and director while Leeds was its secretary and attorney (79,80). Leeds signed a corporate resolution authorizing the opening of a corporate account at the Central State Bank (91) but never signed the resolution purportedly bearing his signature opening a corporate account at the Chelsea National Bank (95,96,97).

At Appellant's request he prepared 25 convertible debentures in the amount of $10,000.00 each (81,83). Each debenture at the option of the holder could be converted into Superior Plans stock.(86) Appellant indicated that he desired to sell the debentures to John Gluskin among others (81) and that the purpose of the debentures was to raise capital for Superior Plans, Inc. (121,122). Gluskin sent Leeds an undated letter exercising the right of conversion in connection with the debentures which was given to the Appellant (135, 136). Leed's secretary inserted the name John Gluskin on some 25 of the debentures.

Testimony of AL DAYON

Al Dayon, employee and shareholder of Mastercraft Corporation testified that John Gluskin was told the company needed funds and Gluskin was in charge of raising them (145). A meeting at which the Appellant did not attend was held to discuss the possibility of raising funds through the sale of Mastercraft stock belonging to its

employees (146). Dayon was attempting to testify to statements made by Gluskin to him at the meeting concerning Appellant's participation in the sale of Mastercraft stock. (146,147). Defense counsel objected to this line of questioning (147). Over objection the court held the statements made by Gluskin to Dayon concerning Appellant's participation admissible as an agency exception pursuant to Federal Rules of Evidence 801 (D) (2) (D) (155,158). The defense contended the Gluskin was the agent of Dayon and not the Appellant so that the agency exception had no application here. (159). The Court ruled the statements admissible and that it was for the jury to determine what weight to give them and whether an agency relation existed (164).

After Leeds withdrew from the active selling of the stock Gluskin said that he would now handle the sales proceeds and opened a personal account for this purpose (183-184). The Court permitted testimony over defendant's objection that Gluskin told Dayon that the Appellant would sell the stock, that the proceeds would go to the benefit of Mastercraft and that a percentage would go to the Appellant (182-183). Gluskin told Dayon that he was going to have to give money to Appellant because he was the only one who could sell the stock (194). Gluskin said he gave money to the Appellant for selling the Mastercraft stock (197). Later he contradicted this version and said he gave a certain amount of money $500,000.00

to Appellant for the purchase of Superior Plan debentures. (196). Gluskin said he thought it was a good investment (197). Appellant never told Dayon he wanted a payoff for selling Mastercraft stock, only Gluskin told Dayon that (197,199). Appellant told Dayon that the money Gluskin gave him had been for the purchase of Superior Plan debentures, that it was a debt, and admitted it was not his money (198,199).

Testimony of JOHN NAGURNEY

John Nagurney, legal assistant to the Chemical Bank testified as to the existence of the H. John Gluskin special account (203,204). Of the total of deposits made into this account $540,000.00 worth of checks were drawn on this special account and made payable to Superior Plan's bank accounts (218). The total of checks drawn on the Gluskin special account and payable to Superior Plan's Chelsea National Bank Account was $70,000.00. The total of checks drawn on the Gluskin special account and payable to Superior Plan's Central State Bank Account was $470,000.00 (218,219).

Testimony of IRVING A. KING

Irving King, assistant treasurer of the Central State Bank testified that an account in the name of Superior Plans, Inc. was

opened on March 1,1968 (211). Of the $470,000.00 originally drawn on the Gluskin account and deposited in Superior Plan's Central State Account, $68,000.00 was transferred leaving $402,000.00 in Superior's account with the Central State Bank (275). Based upon bank records a large part of this amount was withdrawn from March to August of 1968 in the form of corporate checks made payable to Appellant or cash. Based upon notations on the back of these checks he testified that these corporate checks were primarily disposed of by the Appellant in three ways. At times the Appellant would cash these checks directly, at other times Appellant used the corporate checks to purchase official bank checks which would later be cashed by a discounter of commercial paper, while at other times Appellant would use a portion of the corporate check to purchase official bank checks and take the remainder in cash.

Testimony of LOUIS C. WEED

Louis C. Weed, Assistant cashier of the Chelsea National Bank, testified that an account in the name of Superior Plans , Inc, was opened on June 5,1968 (284). The only signer for this account was the Appellant (283). The total of the checks drawn on this account and made payable to Appellant or cash was $122,000.00 (292). The total amount of these corporate checks was disposed of by the Appellant in the same manner as was testified to by Irving A. King.

Testimony of IRVING LAZURUS

Irving Lazurus testified that he was in the business of discounting commercial paper a/k/a check cashing (311-312) and charged a fee of 1% of the face value of the check for this service (312). Appellant brought him only bank checks to be cashed (314) and he cashed $145,000.00 worth of official bank checks purchased by Appellant from the Central State Bank and $106,000.00 worth of official bank checks purchased by Appellant from the Chelsa National Bank for a total of $251,000.00 cashed for Appellant. (315)

Defendant's Case

Testimony of BERNARD L. GOLDENBERG

The Appellant took the stand on his own behalf and testified that in order to raise capital for Superior Plans, Inc. he followed Leeds' advice as to the sale of convertible debentures and was dealing with John Gluskin as a potential customer (365). John Gluskin paid Superior Plans, Inc. approximately $500,000.00 and received convertible debentures in return (366). John Gluskin was not supposed to pay Appellant for selling Mastercraft stock (365) nor did Appellant ever receive any money from Gluskin for anything other than debentures (366). The payments from Gluskin went from Gluskin's account into that of Superior Plans, Inc. (381)

The Appellant in 1968 knew a man called Arnold Kimis (381). Kimis brought to Appellant's attention a possible investment in Las Vegas (384). There existed the possibility of purchasing a hotel or building one on certain property (385.386). Kimis told him that in order to obtain a gambling license at least a half a million dollars of solvency was necessary (387). It was decided to build a hotel and obtain a gambling license and Superior Plans was to get points (390,391). Appellant gave Kimis cash for Superior Plan's investment (394) and he paid this cash to Kimis or nomirees on his behalf (394, 396, 397). Appellant paid Kimis and his nominees approximately $429,000.00 in cash and received initialed receipts acknowledging payment in return (399,400). Gluskin was familiar with these transactions (543). The executed receipts for moneys and cash that was given by Kimis or his nominees were offered into evidence and accepted. (397,398). He never believed the money paid from Gluskins' account into that of Superior Plans, Inc, was income (404). He negotiated the Las Vegas deal with Kimis with funds belonging to Superior Plans, Inc; and on its behalf (401). The receipts given by Kimis and his nominees acknowledging cash payments belonged to Superior Plans as the money used in payment was its money and not Appellants (442). No part of the cash payments made by Appellant to Kimis and his associates was ever returned (401).

## Government Rebuttal

Testimony of LEO LIBOWITZ

Leo Libowitz, Special Agent of the Internal Revenue Service Intelligence Division,testified that audit meetings in connection with the 1968 returns of Appellant and Superior Plans, Inc. were held (611). Appellant said he personally borrowed the money taken out of Superior Plans (613) and then loaned it to a Mr. Kimis (615). He also stated that Appellant said he had no recollection of giving John Gluskin any documents relating to the money invested in Superior Plans , Inc. (615).

Testimony of BILL HYATT

Bill Hyatt, attorney with the Criminal Section of the Tax Division,testified Appellant told him he borrowed the money from Superior Plans (644) and that the vast part of it went to an Arnold Kimis as an investment (645). Appellant showed Hyatt the initialed receipts he obtained when he gave Kimis money (645,646).

## Miscellaneous Aspects

### Flight

The Government sought a stipulation as to the fact that Appellant had been a fugitive for ten months after the indictment was filed (251). Counsel for Appellant contended that there was no flight

252, 253) that Appellant may not have answered the arraignment but there had been no flight (255,256). Defense counsel contended that flight is different than being a fugitive, that the cases all deal with flight and not with being a fugitive (346).

A stipulation was reached that Appellant did not appear at the adjourned date of arraignment in New York and that ten months later he was arrested in California and transferred to New York for arraignment and trial.

When Appellant was arrested in California he had certain papers indicating he had at some time used names other than his own (570).

These documents were received into evidence as Government's Exhibit 49, 50 and 51 over objection by defense counsel (578).

Defense counsel objected to any instruction regarding flight (631). The trial court held there was sufficient evidence regarding this issue to charge the jury (632). The trial court charged the jury on flight (771) and defense counsel excepted to the charge (775).

POINT NO. I

THE TRIAL COURT ERRED IN ADMITTING STATEMENTS MADE TO THE WITNESS AL DAYON BY JOHN GLUSKIN CONCERNING THE APPELLANT'S ALLEGED PARTICIPATION IN THE SALE OF MASTERCRAFT STOCK.

At the trial of this case the witness Al Dayon was permitted to testify to conversations had with John Gluskin at a meeting at which the Appellant was not present. Dayon, over objection by defense counsel, was permitted to testify that John Gluskin told him that the Appellant would sell the stock of Mastercraft Corporation, that the proceeds of this sale would go to the benefit of Mastercraft and that a percentage of between 20 to 30% would go to the Appellant. He further testified that Gluskin told him that he was going to have to give the money to the Appellant as he was the only one who could sell the stock. Gluskin later told Dayon that he gave money to the Appellant for selling Mastercraft stock. Gluskin died prior to the commencement of the trial.

The trial court held Gluskin's statements to Dayon concerning the Appellant admissible under the agency exception contained in Rule 801 (D) (2) (D) of the Federal Rules of Evidence. This rule states in pertinent part that:

> "(D) Statements which are not hearsay-A Statement is not hearsay if-(2)...The statement is offered against a party and is ...(D) A

> statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship..."

The trial court admitted Gluskin's statements under the theory that John Gluskin was the agent of the Appellant and thus these were statements falling within the purview of Section 801 (D) (2) (D).

The Court erred in permitting Gluskin's statements to be admitted into evidence as no proof of an agency relationship between Gluskin and the Appellant was adduced at trial.

Rule 801 (D) (2) (D) makes statements by agents within the scope of their employment admissible. Once agency and the making of the statement while the relationship continues are established, the statement is exempt from the hearsay rule, so long as it relates to a matter within the scope of the agency. Weinsteins Evidence 801 (D) (2) (D) [01] at page 137.

Thus, we see that an agency relationship must be established by competent evidence before these statements are admissible. "Agency" is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other to so act. Matthews Conveyor Co. v. Palmer Bee Co. ,135 F. 2d. 73 ( 6th Cir. 1941); Agency is ultimately a question of the intention of the parties as is evidenced by their acts. Granite St. Fire Ins. Co. v. Mitton,

98 F. Supp. 706 (D.C. Colo. 1951).

For an agency relationship to have existed between Gluskin and the Appellant it was necessary that some intent, some manifestation of control and consent be present. Dayon's testimony in no way illustrated that any of the necessary elements of agency existed between Gluskin and the Appellant. Even if Gluskin had intimated or directly stated that such an agency existed this would have been insufficient in and of itself as agency and authority cannot be proved by the hearsay statements of the alleged agent himself. Brownell v. Tide Water Associated Oil Co. of America, 121 F. 2d. 239 ( 1st.Cir. 1941); United States v. Konovsky, 202 F. 2d. 721 (7th Cir. 1953).

The existence of an agency is a questionof fact which must be proved by the person asserting it. Steinbrugge v. Haddock, 28 F 2d. 871 ( 10th Cir. 1960). The burden of proof on agency is on the person asserting it. Bogue Elec. Mfg. Co. v. Coconut Grove Bank, 269 F. 2d 1 (5th, Cir. 1959). Thus, the government had the burden of proving this relationship between Gluskin and the Appellant and wholly failed to meet it.

John Gluskin was the attorney for Mastercraft Corporation. Al Dayon was a stockholder and employee of this same corporation. Appellant was involved in planning a merger which was ultimately

completed and left Mastercraft as the surviving entity. The only evidence relating to the fact that Appellant received cash for selling Mastercraft stock was the statements made to Dayon by Gluskin. Apart from these statements which are not indicative of an agency relationship and even if they were would be insufficient in and of themselves;no other evidence was adduced showing an agency relationship.

Indeed the facts point to a relationship of buyer and seller between Gluskin and Appellant. Appellant testified he received monies from Gluskin for debentures and later Gluskin reversed his prior statements to Dayon and stated this a so.

Proof of "actual authority" of an agent either express or implied does not require or necessarily include proof that the third party who seeks to establish the agency knew of or relied upon its existence, but the facts and circumstances relied upon to establish the agents authority, whether it be actual or implied; must consist of words or conduct of the principal unless the acts of the agent are shown to have been with principal's knowledge and express or tacit consent. Gosney v. Metropolitan Life Ins. Co. 114 F. 2d 649 (8th Cir. 1940).

No facts or circumstances were adduced to prove agency, none of the classical incidences of agency, those of control, consent or

intention were shown to have existed between Gluskin and the Appellant. The only evidence adduced established an arms length transaction between the Appellant as seller of certain debentures and Gluskin as the purchaser on behalf of Mastercraft.

It is important to note that the only evidence relating to payments received by the Appellant for selling Mastercraft stock was the statements to this effect made by Gluskin to Davon and admitted by the court under the agency exception.

Evidence extremely damaging andprejudicial to the Appellant was admitted under the agency exception contained in Rule 801 (D) (2) (D) without a proper foundation being laid as the rule requires.

POINT NO. II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FLIGHT AS NO EVIDENCE OF FLIGHT WAS ADDUCED AT THE APPELLANT'S TRIAL.

At the trial of this case both the Assistant United States Attorney and defense counsel entered into a stipulation that the Appellant received notice that he was required to be present in New York for arraignment on April 25,1975, but pursuant to Appellant's request from California, the arraignment was adjourned until May 12, 1975. Both sides further stipulated that the Appellant failed to appear in New York on May 12th and was subsequently arrested in California on January 10,1976, by Federal authorities.

At the time of his arrest in California Appellant had certain documents in his possession containing names other than his own. At sidebar the government evidenced its intention to introduce these documents as relevant to the issue of flight. These documents were admitted into evidence over the objection of defense counsel. The trial court charged the jury on the issue of flight and defense counsel excepted to the charge.

The court committed substantial error in charging the jury on the issue of flight because no evidence of flight was before the court. The stipulation entered into at trial at most indicates that the Appellant was at worst a fugitive from justice as a result

of his failure to appear at his scheduled arraignment on May 12, 1975. Flight is indicative of an affirmative, conscious course of conduct designed to evade detection and avoid prosecution. The Appellant's failure to appear was passive non-compliance. No evidence was introduced regarding any affirmative action surrounding the facts contained in the stipulation.

The Government was unable to introduce any evidence that the Appellant did not use the names contained in the documents prior to the date of his indictment. The Government utterly failed to prove that these names had not been used by the Appellant in the past and had been assumed for the purpose of flight. As a result the documents were in no way probative on any issue of flight and were insufficient to justify an instruction to the jury. Thus, the court's instruction regarding flight was highly prejudicial and constituted plain and substantial error.

Evidence of flight is admissible in prosecutions since such evidence may tend to prove a defendant's consciousness of guilt. Shorter v. United States, 412 F. 2d. 428 (9th Cir. 1969), Green v. United States, 259 F. 2d. 180 (C.A. D.C. 1958).

Though admissible the issue of flight has long been a troublesome one to the courts. Even where concrete evidence of flight is present courts have recognized the many possible motives that might

induce flight and the dangers inherent in its admissibility.

The United States Supreme Court as long ago as 1896 noted in Alberty v. United States, 162 U.S. 499 (1896), that even innocent men sometimes hesitate to confront a jury and not necessarily because they fear that a jury will not protect them. The Supreme Court later expressed doubt about the probative value of evidence of flight. Wong Sun v. United States, 371 U.S. 471 (1963). Flight may not be a reliable indication of guilt and its propriety has been questioned. United States v. White, 488 F. 2d. 660 (8th Cir. 1973). Evidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence. United States v. Robinson, 475 F. 2d. 376 (C.A.D.C. 1973).

Where, as in the case at bar, the record is barren of meaningful evidence of flight it is substantial error for the court to instruct the jury on this issue. United States v. Vereen, 429 F. 2d. 713 (D.C.D.C. 1970).

Flight instructions have received substantial criticism in recent years, chiefly because the risk is great that an innocent man would respond similarly to a guilty one when a brush with the law is threatened. United States v. Vereen, Supra. It should be clear that cases have pointed inescapably to the fact that flight instructions should be used sparsly. United States v. Austin, 414

F. 2d. 1155 (C.A.D.C. 1969).

As a result even when concrete evidence of flight exists courts have taken notice of the unreliability and dangers inherent in the concept.

Flight evidence is admissible to prove a defendant's consciousness of guilt. The evidence adduced at trial wholly failed to correspond to any consciousness of guilt and thus fails to satisfy the criterion for admitting evidence regarding flight.

The Appellant's failure to appear for arraignment is no evidence of flight since flight implies a conscious affirmative effort to elude detection and evade prosecution. Appellant's passive non-appearance was in no way indicative of flight.

The documents found in Appellant's possession at the time of his arrest in California were likewise not relevant or probative as to any consciousness of guilt. Conspiculously absent from the Government's case was any evidence showing that the Appellant did not use these names prior to investigation by the Government. Failing this the documents were in no way relative or probative on the issue of flight because continued use of names used prior to the period in question would in no way reflect a consciousness of guilt.

An examination of the "flight" evidence adduced at trial shows it to be insufficient to warrant an instruction to the jury and thus the Appellant was severely prejudiced by this substantial error on the

part of the trial court.

## CONCLUSION

For the above stated reasons the judgment should be reversed.

Dated· October 7,1976

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Mr. Bancroft Littlefield, Assistant United States Attorney, United States Department of Justice, Southern District of New York, United States Courthouse, Foley Square, New York, New York., by mail this 11th day of October, 1976.

Morton Berger

MORTON BERGER